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No. 920

In the Supreme Court of the United States

OCTOBER TERM; 1960

MAX MILLET AND DORA MILLET, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	9
Appendix A	10
Appendix B	13

CITATIONS

Cases:

Blanc v. *United States*, 244 F. 2d 708, certiorari denied, 355 U.S. 874	8
Chase v. *United States*, 155 U.S. 489	8
Clay v. *United States*, 210 F. 2d 686, certiorari denied, 347 U.S. 927	8
Guerini Stone Co. v. *Carlin*, 240 U.S. 264	8
Seattle Ass'n of Credit Men v. *United States*, 240 F. 2d 906	9
United States v. *Jones*, 131 U.S. 1	8
Wells v. *Long*, 162 F. 2d 842	9

Statutes:

Act of April 24, 1920, 41 Stat. 578, 39 U.S.C. 11 (1952 ed.)	2, 5, 10
Act of March 3, 1925, 43 Stat. 1105, 39 U.S.C. 12 (1952 ed.)	2, 5, 10
Act of September 2, 1960, Public Law 86-682, 74 Stat. 578, 39 U.S.C. 2102-2116 (Supp. II)	2
Post Office Department Financial Control Act, 64 Stat. 460, Sec. 8, 39 U.S.C. 794f (1952 ed.)	2, 4, 6, 10

Statutes—Continued

Page

Post Office Department Property Act of 1954, 68 Stat. 521, 39 U.S.C. 901-909 (1958 ed.) 2, 4, 5, 6, 10
39 U.S.C. 901 ..... 6, 10
39 U.S.C. 902 ..... 6, 11
39 U.S.C. 903 ..... 6, 7, 12
Tucker Act, 28 U.S.C. 1346(a)(2) 3, 8
28 U.S.C. 2410 ..... 3, 8, 9

Miscellaneous:

Sen. Rept. No. 1084, 83d Cong., 2d Sess. 7

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OPINIONS BELOW

The opinion of the district court (R. 28a-32a) is reported at 189 F. Supp. 88.[1] The opinion of the Court of Appeals (Pet. App. 19-20) is reported at 287 F. 2d 409.

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[1] Since the Court of Appeals affirmed, *per curiam* on the opinion of the district court which is not set forth in the petitioners' appendix, we have reproduced the district court's opinion in Appendix B to this brief, pp. 13-17, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on March 23, 1961. The petition for a writ of certiorari was filed on April 24, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Postmaster General had authority, prior to enactment of the Post Office Department Property Act of 1954, to enter into a lease to furnish space for post office use in a building to be constructed rather than in an existing structure.

STATUTES INVOLVED

The pertinent provisions of the applicable statutes are set forth in Appendix A, pp. 10-12, *infra*.[2]

STATEMENT

On January 16, 1953, the then owner of the petitioners' property, which, at that time, was a vacant parcel of land, submitted to the Post Office Department a "Proposal To Lease Quarters" (R. 2a-3a, 26a-28a). It provided for the leasing of a structure to be built on the parcel of land in accordance with the standard form of Post Office Department lease which was attached to the proposal (R. 2a-3a, 26a-28a).

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[2] On September 2, 1960, Public Law 86-682, 74 Stat. 578, was approved enacting a completely revised Title 39, The Postal Service. 39 U.S.C. (Supp. II). The provisions corresponding to Sections 11, 12, 791f and 901-909, applicable here, are now covered in the new title in Sections 2102-2116.

The lease was to run for a period of twenty years upon the completion of the building (R. 3a, 26a, 28a). The proposal to lease was accepted by the Post Office Department on April 21, 1953 (R. 2a-3a).

In January, 1954, after the proposed structure was erected, the previous owner and the Post Office Department executed a lease for the twenty-year period from January 15, 1954, to January 14, 1974 at an annual rental of $11,000 (R. 3a, 14a-16a). The Post Office Department has occupied the premises ever since (R. 3a, 29a). On April 20, 1955, the petitioners became the owners of the property, subject, of course, to the outstanding lease. (R. 12a-13a, 29a).

On July 12, 1960, the petitioners filed their complaint in the district court (R. 2a-4a). After setting forth the facts involved in the leasing arrangement, the petitioners alleged that prior to the passage of certain legislation on July 22, 1954, the Postmaster General lacked authority to enter into the lease agreement and that, as a consequence, the lease, being "in violation of 41 U.S.C.A. 11 * * * which statute prohibits such contract unless authorized by law", was "invalid and null and void" (R. 3a). Asserting violation of their Fifth Amendment rights by continuance of the allegedly invalid charge on their property, the petitioners demanded judgment annulling the lease instrument (R. 4a). Jurisdiction in the district court was invoked under the Tucker Act, 28 U.S.C. 1346 (a)(2), and under 28 U.S.C. 2410 (R. 2a).

The United States moved to dismiss the complaint for failure to state a claim upon which relief could

be granted (R. 7a-10a). The district court granted the motion, holding that the Postmaster General had authority prior to 1954 to lease the premises here involved (R. 28a-32a; App. B, *infra*). The court pointed to 1950 legislation, the Post Office Department Financial Control Act, 64 Stat. 462, 39 U.S.C. 794f (1952 ed.) (App. A, *infra*, p. 10), granting the Postmaster General authority to "enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate * * * ". As to the Post Office Department Property Act of 1954, 68 Stat. 521, 39 U.S.C. 901-909 (1958 ed.) (App. A, *infra*, pp. 10-12), the court observed that this legislation did not, as the petitioners contended, grant for the first time the authority to enter into the lease here involved, but rather, in providing additional methods to the Postmaster General for acquiring property for post office use, merely reenacted the traditional leasing authority exercised in this case.

On appeal, the Court of Appeals affirmed, *per curiam*, on the opinion of the district court (Pet. App. 19-20).

ARGUMENT

The decision of the lower courts is correct and does not warrant further review by this Court. The petitioners' argument is that while, at the time the lease here was executed, the Postmaster General had authority to lease for post office use quarters which were already in existence, he had no authority to lease quarters which a lessor was prepared to con-

struct. The argument is wholly untenable on its face and derives no support whatever from the applicable statutory provisions. Completely aside from the merits, moreover, the action was properly subject to dismissal in the district court for lack of jurisdiction.

1. a. The petitioners' argument is based on the premise that prior to passage of the Post Office Department Property Act of 1954, 68 Stat. 521, 39 U.S.C. 901-909, the Postmaster General had no statutory authority to enter into the agreements he made with the original lessor. These agreements consisted of an offer by the lessor in 1953 to lease quarters to the Post Office Department in a building the lessor was going to construct on its property (rather than in an existing structure), acceptance of the proposal at that time by the Post Office Department, and subsequent execution of the lease in 1954 upon completion of the building. The issue thus posed is whether Congress had conferred leasing authority on the Postmaster General prior to the agreement here executed, and, if so, whether it limited that authority to space in existing structures.

Considerably before the 1950 Act, relied on by the district court, Congress had given the Postmaster General the authority to lease quarters for post office use, limited only by a twenty-year term and certain conditions of rent payment. Act of April 24, 1920, 41 Stat. 578, 39 U.S.C. 11 (1952 ed.); Act of March 3, 1925, 43 Stat. 1105, 39 U.S.C. 12 (1952 ed.) (App. A, *infra*, p. 10). There was nothing in these provisions or anything else to suggest that the authority

conferred was restricted to leasing existing quarters.

As the district court observed, the 1950 Act also authorized the Postmaster General to enter into the agreements with the petitioners' predecessor in interest. It provided, in pertinent part, that the Postmaster General could "enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate * * *". 39 U.S.C. 794f (1952 ed.) (App. A, *infra*, p. 10). The statute is clearly inconsistent with the petitioners' contention that the authority to lease was in some way limited to space in existing structures.

b. The petitioners misconceive the nature of the Post Office Department Property Act of 1954, 39 U.S.C. 901-909 (1958 ed.), when they assert that, in this legislation, Congress, for the first time, granted the authority to enter into the agreement executed here. The initial section of this Act, 39 U.S.C. 901 (App. A, *infra*, pp. 10-11), explaining the underlying purpose and intent, emphasized that this legislation was merely "to supplement existing provisions of law for the leasing of space for postal purposes * * *."

The Act accomplished this purpose by two principal methods. Under 39 U.S.C. 902, the Postmaster General was authorized, for the first time, to enter into lease-purchase agreements from ten to twenty-five years whereby, during the period of the leasehold or at its termination, the United States acquired title to the property involved. The second innovation, under 39 U.S.C. 903 (App. A, *infra*, p. 12), per-

mitted the Postmaster General to acquire property, by condemnation or otherwise, convey it to a lessor for the construction of a building for post office use and to lease the building, upon completion, for a thirty-year term. This is presumably the "build-and-lease agreement" referred to by the petitioner. Pet. pp. 10, 11-13. Neither of these methods, of course, was involved here. The fact that 39 U.S.C. 903(a)(1) (App. A, *infra*, p. 12) reenacts the government's leasing authority with regard to property owned or acquired by the lessor, rather than by the Post Office Department, in no way suggests that this particular authority is being granted for the first time.[3] As the pre-1954 legislation demonstrates, this is simply not so.

The legislative history of the 1954 Act lends no support to the petitioners' argument. As the Senate Committee on Public Works indicated, 39 U.S.C. 903 was no more than "an extension of the present leasing authority of the Postmaster General * * *." Sen. Rept. No. 1084, 83d Cong., 2d Sess., p. 4. And contrary to the petitioners' assertion (Pet. 11-13), the letter of former Postmaster General Summerfield to the Committee, when examined in its entirety, clearly emphasizes the new modes of government acquisition of property for construction of post offices provided by the bill, and does not state that the bill conferred authority for the first time to accept a proposal to

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[3] A very plausible basis for reasserting the leasing authority on property acquired by the lessor in 39 U.S.C. 903(a)(1) is the fact that the leasing term was extended in this section from twenty to thirty years.

lease quarters in a building to be constructed. *Id.* at pp. 11-12.[4]

2. Wholly apart from the foregoing considerations, review should be denied here for the additional and independent reason that the petitioners' action was subject to dismissal for lack of jurisdiction. In the complaint, the petitioners sought annulment of the lease, asserting jurisdiction under the Tucker Act, 28 U.S.C. 1346(a)(2), or alternatively, under 28 U.S.C. 2410, providing that the United States may be named a party in actions, in a court having jurisdiction of the subject matter, to quiet title to, or for the foreclosure of a mortgage or other lien on property on which the United States asserts a claim (R. 2a).

Jurisdiction here, however, did not exist under either of these statutes. The government's consent to be sued under the Tucker Act is limited to actions for a money judgment and incidental relief in equity in aid of such a judgment. *E.g.*, *United States* v. *Jones*, 131 U.S. 1, *Blanc* v. *United States*, 244 F. 2d 708 (C.A. 2), certiorari denied, 355 U.S. 874; *Clay* v. *United States*, 210 F. 2d 686 (C.A. D.C.), cer-

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[4] *Chase* v. *United States*, 155 U.S. 489, relied on by the petitioners (Pet. pp. 13-14), does not support their position since it dealt with the Postmaster General's authority to lease in 1870, long before the passage of the legislation authorizing the leasing of the property here involved. Nor does *Guerini Stone Co.* v. *Carlin*, 240 U.S. 264, help the petitioners. It merely holds that two related contracts must be construed together; neither the decisions of the courts below nor our position here depends upon a separation of the 1953 agreement and the 1954 lease.

tiorari denied, 347 U.S. 927. As to 28 U.S.C. 2410, it is firmly established that it provides no independent basis for jurisdiction. *E.g., Seattle Ass'n of Credit Men* v. *United States*, 240 F. 2d 906 (C.A. 9); *Wells* v. *Long*, 162 F. 2d 842 (C.A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1961.

APPENDIX A

39 U.S.C. 11 (1952 ed.) provides:

> The Postmaster General may, in the disbursement of the appropriation for rent, light, and fuel for first-, second-, and third-class post offices, apply a part thereof to the purpose of leasing premises for the use of post offices of the first, second, and third classes at a reasonable annual rental, to be paid quarterly for a term not exceeding twenty years.

39 U.S.C. 12 (1952 ed.) provides:

> The Postmaster General may make monthly payment of rental for post-office premises under lease.

39 U.S.C. 794f (1952 ed.) provides, in pertinent part:

> In the performance of, and with respect to, the functions, powers, and duties vested in him, the Postmaster General may—
>
> (1) enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate, without regard to the provisions of any law, except those provisions of law specifically applicable to the Department; * * *.
>
> * * * *

39 U.S.C. 901-909 (1958 ed.) provide, in pertinent part:

> § 901.
>
> It is the purpose of this chapter to supplement existing provisions of law for the leasing of space for postal purposes by providing authorization for the acquisition by the Postmaster General of such space through the execution of lease-

purchase and other agreements under which the United States will obtain immediate use of such space and will make periodic payments, and in the case of lease-purchase agreements will obtain title to the property described therein at or prior to the end of the term prescribed therein. It is not the intention of the Congress that the program authorized by section 902 of this title shall constitute a substitute for or a replacement of any program for the construction by the United States of such structures as may be required from time to time by the postal service.

§ 902.

(a) Whenever the Postmaster General determines that (1) there is a substantial need for space for postal purposes in any particular area which cannot be satisfied by utilization of any existing property suitable for the purpose then owned by the Government, (2) the receipts of the post office serving such area exceed $10,000 per year, and (3) the best interests of the United States will be served by taking action hereunder, he is authorized to obtain and provide space for postal purposes in suitable structures of permanent-type construction in the several States, the District of Columbia, and the Territories and possessions of the United States (including Guam), by negotiating and entering into lease-purchase agreements, the terms of which shall not be less than ten nor more than twenty-five years and which shall provide in each case that title to the property shall vest in the United States at or before the expiration of the leasehold term and upon fulfillment of the terms and conditions stipulated in each of such lease-

purchase agreements. Such terms and conditions shall include provision for the application to the purchase price agreed upon therein of rental payments made thereunder. * * *.

* * * *

§ 903.

(a) The Postmaster General is authorized to—

(1) negotiate and enter into lease agreements with any person, copartnership, corporation, or other public or private entity, which do not bind the Government for periods exceeding thirty years for each such lease agreement, on such terms as the Postmaster General deems to be in the best interests of the United States, for the erection by such lessor of such buildings and improvements for postal purposes as the Postmaster General deems appropriate, on lands sold, leased, or otherwise disposed of by the Postmaster General to, or otherwise acquired by, such person, copartnership, corporation, or public or private entity;

(2) for the purposes of paragraph (1) of this section, and without regard to the Federal Property and Administrative Services Act of 1949—

(A) acquire by purchase, condemnation, lease, donation, or otherwise, and on such terms as he shall deem appropriate to the best interests of the United States, real property and interests therein, for use for postal purposes; * * *.

* * * *

APPENDIX B

Opinion of the United States District Court for the Eastern District of New York.

[Caption Omitted]

BARTELS, District Judge.

Motion by defendant to dismiss the complaint pursuant to Rule 12(b)(6), Fed. Rules Civ. Proc., 28 U.S.C.A., for failure to state a claim upon which relief can be granted.

In January, 1953 the predecessor owner of plaintiffs' property (then a vacant parcel of land) entered into an agreement with the defendant acting through its Post Office Department, to lease the premises to the Government for a Post Office in accordance with the standard form of Post Office lease thereto attached, for a term of twenty years upon the completion of a building to be constructed thereon. In January, 1954, when the building was completed, the predecessor owner executed a lease with the Government pursuant to the Lease Proposal of January, 1953, and the Post Office Department has occupied the premises under that lease ever since.

In April, 1955 plaintiffs became the owners of the property subject to the lease, and in July, 1960 filed the complaint herein seeking to annul the lease upon the ground that the same is invalid and void because the execution thereof by the Government was unauthorized.

In effect, the complaint alleges that until July 22, 1954, when §§ 901 to 909 inclusive of Title 39 U.S.C.A.[1] were enacted, the Postmaster General was

[1] Now 39 U.S.C.A. §§ 2103-2116.

not authorized to execute an agreement for the construction and leasing of a permanent-type of structure and that accordingly the lease was executed in violation of 41 U.S.C.A. § 11, which was enacted in 1906 and provides:

> "No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Departments of the Army, Navy, and Air Force, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year."

The Government asserts (i) that on January 16, 1953, the date of the Lease Proposal, and at all the times thereafter including January 28, 1954, the Postmaster General was authorized to enter into the lease pursuant to the Post Office Department Financial Control Act of 1950, 39 U.S.C.A. § 794f, which provided in part:

> "In the performance of, and with respect to, the functions, powers, and duties vested in him, the Postmaster General may—
>
> "(1) enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate, without regard to the provisions of any law, except those provisions of law specifically applicable to the Department; * * *",

and (ii) that performance by the Post Office Department under the lease for more than six years after the enactment of the 1954 Act constituted ratification of the lease. This last contention can be disposed of by reference to Chase v. United States, C.C.Ind.1890,

44 F. 732, affirmed 155 U.S. 489, 15 S.Ct. 174, 39 L.Ed. 284, to the effect that if authority is lacking in the first instance, there is no ratification by subsequent occupation by the Post Office Department.

The essence of plaintiffs' argument is that the grant of express authority to enter into this type of lease by the 1954 Act automatically excluded the existence of prior authority for such lease in view of the prohibition contained in 41 U.S.C.A. § 11. Plaintiffs' contention that the 1950 Act is inapplicable is difficult to understand. In substance, they state that the 1950 Act provides for the improvement of Post Office Department accounting methods and procedures and grants authority to the Postmaster General to waive the existing general statutes on Government leases when he enters into leases of real property based on 39 U.S.C.A. They apparently claim that the Act imposes a limitation upon the authority of the Postmaster General without specifying how. Their argument appears, however, to be only another way of stating that the Postmaster General has the authority specifically granted to him under the 1950 Act to enter into such leases of real property as may be necessary in the conduct of the affairs of the Department "on such terms as he may deem appropriate, without regard to the provisions of any law" except those specifically applicable to the Department. The legislative purpose of the Act may be gleaned from the Senate Report concerning Section 794f which states that this section "gives the Postmaster General additional authority and freedom of action with respect to the leases of real property". S.Rep.No. 2217, 81st Cong., 2d Sess. (1950), U.S. Code Cong.Serv. 1950, Vol. 2, p. 3028. The wording of the 1950 Act would have little meaning unless

it were construed to grant the Postmaster General the authority to enter into the lease in question.

It is a *non sequitur* to argue that the express authority granted by the 1954 Act is a clear indication of the non-existence of prior authority under the 1950 Act. The purpose of the 1954 Act was to expand the authority already possessed by the Postmaster General and to expressly authorize him to execute lease-purchase agreements and purchase-lease agreements. In the grant of such broad authority the statute in its general language necessarily authorized as an incident thereto, leases of the type herein involved. From such language it does not follow, however, that no authority existed prior thereto for the execution of the present lease. Section 901, 39 U.S.C.A.[2] stated in part:

> "It is the purpose of this title to *supplement* existing provisions of law for the leasing of space for postal purposes by providing authorization for the acquisition by the Postmaster General of such space through the execution of lease-purchase and *other agreements* under which the United States will obtain immediate use of such space and will make periodic payments. * * *" (Emphasis added).

Thus the authority granted under the 1954 Act supplements and expands the authority granted under the 1950 Act by giving the Postmaster General authority to enter into the leases set forth in Sections 901 to 909 inclusive. The lease involved in this case is not a lease-purchase nor a purchase-lease agreement but simply a term lease, which while authorized under the 1954 Act, was also authorized under the

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[2] Now 39 U.S.C.A. § 2115.

1950 Act. Under this construction 41 U.S.C.A. § 11 has not been violated because the lease agreement was "authorized by law" and one need not inquire whether the appropriation was "adequate to its fulfillment". The above construction also accords with the wording of the various Acts above mentioned, the Congressional intent and the conditions which the various Acts purported to obviate. There is no merit in plaintiffs' complaint and it therefore must be dismissed.

Settle order within ten (10) days on two (2) days' notice.

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